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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-333

PATRICIA ANNE NORTH,
Appellee,

vs.

KENNETH E. NORTH,
Appellant.

APPEAL FROM THE SUPREME COURT OF KANSAS
KANSAS SUPREME COURT CASE NO. 47701

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

I. GENERAL SUMMARY:

This action is an appeal taken from the final ruling of the Kansas Supreme Court in *North* v. *North*, Kan., 535 P.2d 914, in which the judgment of the Johnson County, Kansas District Court granting a decree of divorce to

plaintiff-appellee on the grounds of incompatibility was upheld.

Defendant-appellant, in appealing from the judgment and orders rendered by the trial court on April 22, 1974, directly assaulted the basis for the District Court's ruling, simultaneously challenging K.S.A. 1974 Supp. 60-1601(8) as an enactment that was repugnant to the United States Constitution. The Kansas Supreme Court affirmed the lower court's decision on May 10, 1975, ruling that the challenged statute was, in fact, constitutionally valid. Appellant moved the reviewing court for a rehearing on May 19, 1975, alleging numerous procedural and substantive errors in the concurring court's decision. The motion for rehearing was denied without comment on June 2, 1975, and the Kansas Supreme Court issued its mandate in the action on June 5, 1975.

Appellant consequently filed a "notice of appeal to the Supreme Court of the United States" with the Clerk of the Kansas Supreme Court on June 5, 1975, invoking the higher court's jurisdiction in accordance with the provisions of 28 U.S.C. § 1257(2).

Leading cases relied upon by the appellant during the original review phase which appellant believes may be reasonably construed to sustain federal jurisdiction include:

A. *Boddie* v. *Connecticut*, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113 holding that a statute may be deemed constitutionally invalid as applied when it operates to deprive an individual of a protected right, although its general validity as a measure enacted in the legitimate exercise of state power is beyond question;

B. *Street* v. *New York*, 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed.2d 572 declaring that the "right to differ" is an inherent component of first amendment guarantees;

C. *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963) enunciating the principle that any statute challenged as a plausible threat to the exercise of first amendment rights bears "a heavy presumption against its constitutional validity";

D. *Roe* v. *Wade*, 410 U.S. 113 capsuling the criteria involved in the test for stricter judicial scrutiny which may be invoked in those equal protection cases where the challenged statute generates a "suspect" category or impedes the exercise of a fundamental right.

This divorce was granted under the statutory aegis of K.S.A. 1974 Supp. 60-1601(8), which reads as follows:

60-1601. Grounds for divorce or separate maintenance.

The district court may grant a decree of divorce or separate maintenance for any of the following causes: (1) Abandonment for one year; (2) adultery; (3) extreme cruelty; (4) habitual drunkenness; (5) gross neglect of duty; (6) the conviction of a felony and imprisonment therefor subsequent to the marriage; (7) confinement in an institution by reason of mental illness for a period of three (3) years, which confinement need not be continuous, or an adjudication of mental illness or mental incapacity by a court of competent jurisdiction, without discharge or restoration therefrom and without confine-

> finement for more than three (3) years with, in either case, a finding by at least two (2) of three (3) physicians, appointed by the court before whom the action is pending, that the defendant has, based upon general knowledge available at such time, a poor prognosis for recovery from such mental illness or mental incapacity; but a decree granted on this ground shall not relieve the plaintiff from contributing to the support and maintenance of the defendant; (8) incompatibility. (K.S.A. 60-1601; L. 1965, ch. 354, § 14; L. 1967, ch. 327, § 1; L. 1969, ch. 286, § 1, July 1.)
>
> P. 352, Chapters 48-64, Volume 4, 1974 Cumulative Pocket-Part Supplement to Kansas Statutes Annotated.

Essentially three questions evolving from this appeal fell within the jurisdictional parameters of 28 U.S.C. § 1257(2):

1. Whether or not K.S.A. 1974 Supp. 60-1601(8), applied in a unilateral manner, did in fact constitute a denial of the appellant's right to equal protection under the law;
2. Whether or not K.S.A. 1974 Supp. 60-1601(8), as applied, infringed upon appellant's freedom of expression, and further functions as a prior restraint upon the exercise of this right;
3. Whether or not K.S.A. 1974 Supp. 60-1601(8), having been challenged as constitutionally repugnant by impeding the exercise of a fundamental right, fails the test of strict judicial scrutiny.

II. STATEMENT OF THE CASE

North v. *North* came on for hearing on the merits at a time when the concept of incompatibility was without substantive form in Kansas. The Legislature, in enacting the challenged statute, had simply added the term "incompatibility" to the seven existing grounds for divorce, without providing either additional definition or statutory clarification. Since the Kansas Supreme Court had not yet had an opportunity to confront the question, the trial court in this action was largely left to its own discretion.

During closing trial summations, counsel for both parties made reference, however, to a law review article annotated to the statute entitled "Incompatibility: A 'New' Approach to the Dissolution of Marriage", 20 Kan. L. Rev. 227, R. E. Schulman. Professor Schulman, a family law instructor at the University of Kansas Law School, commented on the probable thrust of legislative intent and reviewed the foreign decisional law treating the concepts of incompatibility and mutuality of incompatibility.

Plaintiff's counsel's conclusion included a unilateral interpretation that was strongly urged upon the court. The heart of this argument was an assertion that "a sworn statement by one party that they are incompatible" was all that the law in Kansas required. (R. 76)

The trial court, in effect, adopted that posture, noting that "we aren't concerned with the doctrine of incompatibility in Kansas . . . or mutuality of incompatibility." (R. 78) A more enlightening insight into the District Court's evidential priorities was provided when the court stated:

> The Court is concerned primarily with one issue, and that is whether or not, from the evidence, the parties do, in fact, have different lifestyles, have different de-

sires in life, whether or not they are arguing and quarrelling frequently. . . (R. 78)

These guidelines became the law of the case when the trial court subsequently predicated its conclusion of law that the parties were incompatible upon findings of fact that the parties had differing goals and interests in life, and argued and quarreled frequently. (R. 82)

Inasmuch as the above-referenced basis for the District Court's decision was not announced until completion of the trial phase, appellant's first opportunity to challenge these determinations was on appeal to the Kansas Supreme Court. The federal questions treated herein were framed within the "statement of points" filed with the District Court on August 23, 1974, pursuant to Kan. S. Ct. Rule Six, and thereby reviewable under the prevailing Kansas rules and case-law.

Specifically: the question of unilateral divorce as a denial of equal protection was encased in "point six"; the question of a statutory conflict with freedom of expression was treated in "point five"; and the test for strict judicial scrutiny was introduced in "point seven". (R. 21)

The presentation of constitutional issues before the Kansas Supreme Court, however, was essentially a one-sided endeavor.

Plaintiff-appellee maintained that it was not necessary for the review court to confront the question of unilateral divorce, to consider whether or not the trial court's application of statute represented an unconstitutional infringement on appellant's first amendment prerogatives, or to even address the issue of whether or not the statute was in the compelling interests of the state. (Point III, Pl. Brief, 20-21) No further acknowledgement of federal questions was forthcoming from plaintiff-appellee during either her oral argument or her answers in opposition to appellant's motion for rehearing.

An intrusion into the federal perimeter was effected once, however, when plaintiff cited a difference-of-opinion between the parties over the propriety of a dress as evidence of the fact that they "argued and quarrelled". (Para. 53, P. 7, Pl. Brief) The state supreme court relied on this instance in its affirming decision as evidence of the fact that the parties argued and quarrelled. Kan., 535 P.2d 917. Appellant's motion for rehearing reiterated his long-standing contention that plaintiff's own testimony on this matter established that it was only a difference-of-opinion that was never accompanied by any indication of hostility or a heated verbal exchange. (Count I, P. 1, Mot. for Rehearing; R. 53-54)

Overall, the Kansas Supreme Court appeared disinclined to confront the federal questions in this action, although it relied on a different rationale than did plaintiff.

Simply stated, the review court elected to conclude that there was ample evidence of mutual incompatibility, ergo rendering the consideration of all federal questions moot:

> The only reasonable conclusion we can reach is that each party is incompatible with the other. This finding negates defendant's claim that there was a unilateral divorce. Defendant's contentions cannot be sustained since the premise upon which they are based is untrue. We do not mean to imply that if the premise were true we would find merit in defendant's position. We are merely saying the issues raised by defendant need not be resolved in this action. All points raised

by defendant have been considered and found to be without merit. . . *North* v. *North*, Kan., 535 P.2d 917.

Appellant's motion for rehearing aggressively contested this interpretation, pointing out that the conclusion of mutual incompatibility was:

A. contrary to the face of the pleadings per se, in that his answer opposed the petitioner's prayer-for-relief (R. 5) and his initial motion asked the court to order counseling (R. 6);

B. contrary to the detailed testimony of both parties, including the plaintiff's father (Para. 2, R. 18; Para. 14, R. 20; R. 123);

C. substantially predicated upon a quotation from the record that the review court had taken out of context, and that, properly restored to the text of the record, unequivocally established the unilateral nature of the action (R. 61; Count III, P. 2, Mot. for Rehearing).

Simultaneously, the review court was respectfully reminded that the trial court, who had a superior opportunity to observe the witnesses and evaluate their demeanor and testimony, noted no evidence of mutuality of incompatibility, subsequently dismissing its relevance or applicability to the case before it. (Count III, P. 3, Mot. for Rehearing; R. 78)

It was additionally noted that the question of first amendment abuses remained unresolved. In short, appellant's constitutional "right-to-differ" had been incontestably abrogated by the trial court's findings of fact regardless of whether or not the alleged differences evidenced mutuality of incompatibility. (Count V, P. 4, Mot. for Rehearing)

Finally, Appellant invited the review court's attention to the fact that the trial court's application of statute through these specific findings constituted a prima facie basis for applying the test of strict judicial scrutiny. (Count VI, P. 4, Mot. for Rehearing) As earlier indicated, however, the Kansas Supreme Court denied the motion for rehearing without comment and the appeal was therefore prosecuted to this court.

III. BASIS FOR U. S. SUPREME COURT JURISDICTION:

The following categorical synopsis is intended to concisely summarize the basis for United States Supreme Court jurisdiction in the instant appeal:

A. Statutory Assault

Appellant directly and persistently challenged the validity of K.S.A. 1974 Supp. 60-1601(8), asserting that there were clear and persuasive indications that the law was repugnant to the United States Constitution both per se and as applied. The conclusion to appellant's brief enunciated his standing to challenge the statute and specifically petitioned the Kansas Supreme Court to rule the operative section of the law invalid. (P. 30, Brief of Appellant) Appellant's motion for rehearing reiterated this prayer for relief stating that "appellant's right to reversal and invalidation of the statute rests on firm, independent federal grounds." (Count VI, P. 5, Mot. for Rehearing) The objectives, intendment, and orientation of this appeal at the state level therefore fulfill the preliminary criteria anticipated by 28 U.S.C. § 1257 (2).

B. Affirmance of Constitutional Validity

In its decision of May 10, 1975, the Kansas Supreme Court unequivocally ruled in favor of the constitutional validity of K.S.A. 1974 Supp. 60-1601(8), declaring that "Defendant's challenge as to the constitutionality and validity of K.S.A. 1974 Supp. 60-1601(8) is without merit." (Para. 4, Syllabus, Kan., 535 P.2d 915)

C. Consideration of Federal Questions

The specific federal questions raised by the appellant before the Kansas Supreme Court were not individually considered on the merits for the reasons previously cited herein. But, it is appellant's contention, however, that federal jurisdiction remains nonetheless secure inasmuch as there exists on the face of the record sufficient cause to suspect that the review court may have evaded the constitutional issues through purposeful reasoning.

If there exists one concept underwriting the faith of the people in the process of judicial review, it is the continuing commitment to interpret words and phrases within the context of their common, generally-accepted meaning. Although this practice has been virtually institutionalized in recent years by the decisional law emanating from the Kansas Supreme Court, the ruling in this action represents a singularly noticeable deviation from that desirable trend.

Consideration of the constitutional issues in *North* v. *North* largely pivoted on the review court's interpretation of the term "unilateral". Relying on secondary sources on the subject (Para 5, Kan., 535 P.2d 917), the court adopted a working definition of "unilateral divorce" contingent upon its interpretation of the mutuality concept. Placed in its proper perspective, however, the unilateral

character of a divorce hinges less upon the evidencing of mutual incompatibility—albeit a proper area for judicial inquiry in this determination—than it does on the more obvious question of whether or not both parties are relatively acclimated, if not in fact agreeable, to the dissolution of the marriage.

Stated simply, the term "unilateral" means one-sided; and that is precisely the definition that men of ordinary intelligence would assign it in everyday usage. That is the interpretation that appellant assigned it within the scheme of this appeal, for it is unilateral divorce in theory that becomes mandatory and compulsory divorce in practice resulting in the equal protection conflict.

Because the review court's reliance on an ancillary definition of "unilateral" functioned as a practical mechanism through which federal questions could be avoided, appellant maintains that his right to have asserted constitutional prerogatives reasonably adjudicated clearly preserves federal jurisdiction.

Practically speaking, the federal questions contained herein were passed on by being passed over.

It is long-settled that a state court may not avoid deciding federal issues thus defeating United States Supreme Court jurisdiction by putting forward non-federal grounds of decision which are without any fair or substantial support. *Wolfe* v. *State of N. C.*, 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650 (N.C. 1960); *N.A.A.C.P.* v. *State of Alabama*, 78 S.Ct. 1163, 1168, 2 L.Ed.2d 1488; *Staub* v. *City of Baxley*, 78 S.Ct. 277, 280, 281, 355 U.S. 313, 318-320, 2 L.Ed.2d 302.

D. Absence of Independent State Grounds

Appellant raises no question in this appeal challenging the right of the state to regulate the marital status within its jurisdictional confines. This court has always recognized the fact that the prerequisites for dissolution of the marriage bond are the exclusive concern of the states, to be determined by legislative expressions of the sovereign will reflecting local norms and community standards.

But any exercise of statutory police power undertaken by the state must necessarily contribute to the furtherance of sound public policy.

The public welfare is the highest law, and, to no small degree, the public welfare is enshrined in first amendment guarantees. Thus, any credible suggestion that a statute, in meaning or in fact, either obstructs the exercise of basic civil liberties or erodes the scope of their protection, will serve to suspend a presumption of statutory legitimacy until there is an affirmative showing that less harm than good is forthcoming.

Both the trial court and the review court in this action supported an applied interpretation of incompatibility subordinating the right to differ and the right to be secure in propria persona within the marital framework to their own narrow concepts of conjugal accord.

Once the trial court had predicated its conclusion of law upon findings of fact exclusively interwoven into the fabric of free expression, it insinuated this decision into a federal arena from which there is no ready withdrawal. Appellant holds, therefore, that the basis for the trial court's ruling positively precludes any suggestion that this decision rests on independent state grounds capable of rendering this court's potential opinion mere dictum.

E. Substantiality of Federal Questions

Appellant contends that this appeal addresses itself to several significant constitutional issues warranting the special consideration of this court.

The substantiality of federal questions in this case rests upon a belief that:

1. *Unilateral Divorce Denies a Litigant the Equal Protection of the Law Assured by the Fourteenth Amendment*

The traditional justifications for divorce in the several states, now commonly referred to as "fault" grounds, afforded a defendant in a divorce action adequate substantive and procedural protection under the law.

The evidential criteria dictated by controlling case-law interpretations of statutory grounds as well as the generally recognized common-law defenses, made it difficult to divorce an innocent party against their will. The law anticipated a clear showing that the defendant had engaged in a course of action perceptively injurious to the other partner that society could not reasonably be expected to condone. Basic elements of tort law within the framework of an adversary proceeding provided a minimal expectation that

a. the defendant be charged with a "civil wrong", i.e. an act (s) or omission(s) that implicitly breached the obligations of the marriage bond and affronted the community's concept of permissible behavior;

b. the alleged act(s), omission(s), or combination thereof, be evidenced by a factual presenta-

tion meeting the established standards of proof in civil actions.

These were working assurances that not only protected the individual against an arbitrary judicial proceeding capable of exposing him to frequently-severe emotional, societal, and financial injury, but also furthered the incontestable commonwealth interest in discouraging promiscuous divorce petitions predicated upon human whim and human frailty.

The search for more enlightened and humane means for dissolving the marital bonds necessitated a re-evaluation of traditional fault concepts that, in some states, resulted either in an abandonment of fault concepts altogether, or an inclusion of non-fault concepts as an alternative recourse.

The "fault" versus "non-fault" controversy is only tangentially germane to the central thrust of this appeal. Appellant casts no aspersions upon the right of the states to eschew traditional common-law mechanisms in favor of statutory innovations more responsive to current social trends and community values. That transition, however, cannot be undertaken at the expense of fundamental legal guarantees embodied in the Constitution and engrained in our cultural heritage.

Prevailing interpretation of the incompatibility concept in Kansas at the time this case came on for hearing held that the filing of the divorce petition itself was a prima facie showing that the parties were incompatible. Thus, unilateral divorce was the accepted, if unenunciated, law of the forum as the record in this case readily demonstrates.

The principal problem with the unilateral application is that it essentially constitutes an "irrebuttable" presumption, i.e. incompatibility is adequately evidenced by the simple showing that one party wishes to terminate the relationship; nothing else need be proven, nor is any defense maintainable.

That philosophy represents a departure from the underlying precepts of Anglo-American jurisprudence that is as unconscionable as it is unprecedented.

The inevitable result is an insidious judicial setting in which the individual is denied the necessary procedural prerogative in which he may challenge the purported factual basis of a determination adversely affecting his vital personal interests. In so doing, the defendant in a unilateral divorce action is denied due process warranties protecting a defendant in any other type of divorce or civil action—an indisputable denial of equal protection assured by the Fourteenth Amendment to the U. S. Constitution.

Furthermore, by simply adding the word "incompatibility" to the seven existing grounds for divorce in K.S.A. 60-1601 without providing any additional clarification, the Kansas Legislature effected a statutory concept that is vague, imprecise, and plainly nebulous.

Application of the doctrine of overbreadth to this statute establishes that men of average intelligence not only cannot agree on, but must necessarily guess at, the purported scope of this law and the extent to which their future expressions

or acts may result in profound civil disabilities. Predictability, second only to simple justice as a legal objective in our judicial framework, is thereby impaired.

The question may be properly raised as to whether or not a unilateral interpretation of this law could have ever ensued were it not void for vagueness from its very inception. These impediments further assail the workings of due process in this setting, suggesting additional reasons why equal protection of the law in unilateral actions is not attainable.

2. *The Trial Court's Application of Law Abridged the Appellant's First Amendment Rights*

The factual findings by the trial court clearly penalized the defendant-appellant for exercising his freedom of expression within the domicile.

In posturing this contention before the review court, appellant argued that:

a. there is a constitutionally-guaranteed freedom to be intellectually diverse and even contrary because the right to differ is an integral adjunct of freedom of expression that cannot be the basis for civil or criminal deprivations of liberty; *Street* v. *New York*, 89 S.Ct. 1354, 394 U.S. 576;

b. civil disabilities cannot be allowed to ensue from a citizen's opinions, beliefs, attitudes, or disposition; *Baird* v. *State Bar of Arizona*, 91 S.Ct. 702, 401 U.S. 1, 1971;

c. civil liberties enjoy a preferential status before the law and traditional presumptions of con-

stitutional validity are reversed once a plausible threat to the exercise of first amendment rights is identified. The resulting "heavy burden against constitutional validity" makes it the affirmative obligation of the state and/or opposing parties to establish statutory legitimacy if the law is to be maintained. *Bantam Books* v. *Sullivan*, 83 S.Ct. 631, 372 U.S. 58 (1963), also the opinion of J. Rutledge in *U. S.* v. *C.I.O.*, 68 S.Ct. 1349, 335 U.S. 106 (1948)

3. *The Statute Fails the Test of Strict Judicial Scrutiny*

Once K.S.A. 1974 Supp. 60-1601(8) had been shown to plausibly impede the exercise of a fundamental right the statute became susceptible to the test of strict judicial scrutiny, but

a. there was no showing by plaintiff or the review court that the statute was in the compelling interests of the state nor was there a rebuttal to appellant's argument that the law was inimical to state interests;

b. there was no showing by either plaintiff or the review court that the statute was the least burdensome alternative possible, having been narrowly drawn in order to minimize the infringement on fundamental rights while effecting its avowed objective.

These deficiencies evidence an inability to satisfy the landmark guidelines for evaluating equal protection cases established by this court in *Roe* v. *Wade*, 93 S.Ct. 705, 410 U.S. 113, 1973.

While it may well be that the Kansas Supreme Court was simply heretofore unaware of the revised criteria mandated by this decision, the vast majority of lower courts have come to terms with this ruling at both the state and federal level:

> "Strict scrutiny" in equal protection cases means that the court must satisfy itself that the law in question is necessary to promote some compelling governmental interest. *De Bottarri* v. *Melendez*, 119 Cal. Rptr. 256, Cal. App. 1975.
>
> In determining whether classification is valid because supported by compelling state interest, government has the burden of showing an interest so compelling that it outweighs fact that suspect class is discriminated against or that there is a deprivation of a fundamental right. *Colorado Springs Amusements, Ltd.* v. *Rizzo*, D.C. Pa. 1974, 387 F. Supp. 690.

Appellant respectfully suggests that the record in this action will evidence a statutory challenge in substantial compliance with the strict judicial scrutiny guidelines of this court.

F. Basis for Plenary Consideration

From a hypertechnical standpoint, it would appear that this court could satisfy itself that the instant appeal was properly invoked in its current configuration, and that, presuming appellant's contentions are shown to be valid, the review court failed to discharge its duty under the law. If such a conclusion were to be forthcoming, the question could be disposed of by either remanding for further consideration or granting appellant's original prayer for relief.

There are larger issues lurking here, in appellant's view, however, that may well warrant a temporary relaxation of "strict scrutiny" enforcement in order to address questions of pervasive public import.

Clearly, the spiralling divorce rate throughout the nation signals a major shift in social trends casting some doubt on the continuing resiliency of the nuclear family structure. Certainly no prudent observer could contest the assertion that family disintegration has a deleterious impact upon the community infrastructure. The far-reaching potential for subsequent social upheaval generated by the resulting juvenile delinquency, adult crime, and sociopathic behavior indicates that this is a question of significant public interest.

By the same token, it is equally apparent that the construction of traditional fault concepts in many states produced only collusion, perjury, and bitterness, further disenchanting the public with a legal system insensitive to their evolving needs.

Because certain issues envisioned in this appeal are mindful of a perceived shift in American mores antedating current methods, appellant suspects that further consideration of this question on the merits through additional briefs and oral argument may point the way to the formulation of legal guidelines that, while remaining cognizant of individual needs, restate the law's long-standing commitment to the preservation of viable family units.

If this court feels that that task is within its proper purview, appellant prays that this question will be brought on for plenary consideration.

Respectfully submitted,

KENNETH E. NORTH
Appellant, Pro Se

APPENDIX

Patricia Anne NORTH, Appellee,

v.

Kenneth E. NORTH, Appellant.

No. 47701.

Supreme Court of Kansas.

May 10, 1975.

Wife's petition for divorce was granted by the Johnson District Court, Division No. 1, Herbert W. Walton, J., and husband appealed. The Supreme Court, Owsley, J., held that incompatibility was a proper ground for divorce; that evidence sustained finding that parties were incompatible; and that evidence demonstrated that each party was incompatible with the other, so that grant of divorce was not unconstitutional on theory that trial court had granted a unilateral divorce.

Affirmed.

Fromme, J., did not participate.

1. Divorce (Key) 34

Incompatibility is a ground for divorce. K.S.A. 60-1601(8).

2. Divorce (Key) 34

"Incompatibility," as a ground for divorce, may be broadly defined as such a deep and irreconcilable conflict in the personalities or temperaments of the parties as

makes it impossible for them to continue a normal marital relationship; conflict must be so deep as to be irreconcilable and irremediable; petty quarrels and minor bickerings are not sufficient. K.S.A. 60-1601(8).

See publication Words and Phrases for other judicial constructions and definitions.

3. Divorce (Key) 132(1)

Fact that legislature, in supplying additional ground of incompatibility, intended to liberalize divorce laws by broadening the bases upon which divorces could be granted did not mean that a divorce should be granted perfunctorily or merely upon a party's charge incompatibility without real proof of the facts. K.S.A. 60-1601(8).

4. Divorce (Key) 132(6)

Wife's testimony that she was not desirous of marriage counseling because she felt it would not be effective or contribute to their roles as parents, that she no longer had any respect for her husband's sincerity, and that she no longer loved him, husband's testimony that both he and his wife had had a very conventional moral outlook at the time that they were married but that wife had changed in that regard, and testimony by psychologist that wife was suffering from acute anxiety as a result of the relationship and that reconciliation would only intensify wife's emotional deterioration sustained award of divorce on ground of incompatibility without ordering the parties to seek marriage counseling. K.S.A. 60-1601(8), 60-1608.

5. Divorce (Key) 132(6)

Evidence that husband and wife did not have common interests or goals, that they argued and quarreled, and

evidence from both parties as to their differing personalities and conflicts demonstrated that each party was incompatible with the other so that grant of divorce to wife on grounds of incompatibility was not unconstitutional on theory that trial court had granted a unilateral divorce. K.S.A. 60-1601(8).

Syllabus by the Court

1. K.S.A. 1974 Supp. 60-1601(8) authorizes the district court to grant a decree of divorce for incompatibility.

2. Incompatibility as defined in Berry v. Berry, 215 Kan. 47, 523 P.2d 342, is restated and approved.

3. In an action for divorce the record is examined and the decree of divorce granted by the district court on the ground of incompatibility is found to be supported by substantial competent evidence.

4. Defendant's challenge as to the constitutionality and validity of K.S.A. 1974 Supp. 60-1601(8) is without merit.

Kenneth E. North, argued the cause and was on the brief for appellant, pro se.

John H. Johntz, Jr., of Payne & Jones, Chartered, Olathe, argued the cause and was on the brief for appellee.

OWSLEY, Justice:

This is an appeal by the defendant husband from a decree of divorce granted to the plaintiff wife on the statutory ground of incompatibility. (K.S.A. 1974 Supp. 60-1601[8].) Defendant raises seven points on appeal which question the sufficiency of the evidence and attack the validity and constitutionality of the incompatibility statute.

Patricia Anne North and Kenneth Edmund North were married on June 22, 1968. At the time of the granting of the divorce Patricia was twenty-six years old and Kenneth was twenty-seven years old. The parties had one female child by their marriage.

After more than five years of marriage Patricia filed a petition for divorce, requesting custody of the child, support, and an equitable property division. Shortly thereafter, Kenneth moved the trial court for an order requiring the parties to seek marriage counseling pursuant to K.S.A. 1972 Supp. 60-1608 (now K.S.A. 1974 Supp. 60-1608). A hearing was held and after presentation of evidence the motion for marriage counseling was denied by the court. At the trial Patricia offered the testimony of six witnesses, in addition to her own statement, plus the testimony of a behavioral scientist. She also submitted various letters written to her by Kenneth both before and after the filing of the petition for divorce. Kenneth presented no evidence other than his own testimony.

After hearing the evidence the trial court issued a decree of divorce based upon the finding that the parties did not have common goals and interests in life, and that they argued and quarreled. The court concluded as a matter of law that the parties were incompatible.

[1-3] Incompatibility as a ground for divorce was authorized by the 1971 Kansas legislature. Since the time of its enactment we have had two cases before this court contesting a decree of divorce granted solely for incompatibility. (See Berry v. Berry, 215 Kan. 47, 523 P.2d 342; and LaRue v. LaRue, 216 Kan. 242, 531 P.2d 84.) Despite the infancy of this provision, certain guiding principles have developed. In *Berry*, we said incompatibility may be broadly defined as such a deep and irreconcilable conflict in the personalities or temperaments of the parties

as makes it impossible for them to continue a normal marital relationship. The conflict of personalities and dispositions must be so deep as to be irreconcilable and irremediable. Petty quarrels and minor bickerings are clearly not sufficient to meet this standard. The legislature, in supplying the additional ground of incompatibility, must have intended to liberalize our divorce laws by broadening the bases upon which divorces may be granted. This does not mean a divorce should be granted perfunctorily or merely upon a party's charge of incompatibility without real proof of the fact. It is the duty of the trial court to weigh the testimony before it, and our function on review is limited to an examination of the record to ascertain whether the findings of the trial court are supported by substantial, competent evidence.

In *LaRue*, we reasserted our approval of the foregoing definitions of incompatibility, and further stated it was difficult to imagine a situation in which a husband's temperament could be compatible with that of his wife if her temperament was incompatible with his.

The first point raised by defendant questions the sufficiency of the evidence to establish incompatibility in their marital relationship. The following is a summary of evidence before the trial court:

[4] Plaintiff testified that she was not desirous of marriage counseling as she felt it would not be effective or contribute to their roles as parents; that their marriage had been a disaster from the beginning; that she had often asked her husband to go to a marriage counselor but he continually refused; that she no longer had any respect for his sincerity on any level; and that she no longer loved him and did not want to continue with the marriage. There was additional testimony to the effect that the parties had an unsuccessful sexual relationship

for as long as they were married. Plaintiff felt her husband was financially irresponsible as he had never paid income taxes and as a result her wages were garnished by the federal government.

Defendant testified his wife had become less interested in his work and she was developing interests of her own in film work and ballet. He further stated that both he and his wife had a very conventional moral outlook at the time they were married, but she had changed in that regard. When questioned by his attorney, he said, "We originally had common goals and I noticed that our common goals were becoming individual goals where she had a career of her own and I had a career of my own. . . ." The parties would frequently go for three or four nights in a row with only limited conversation between them.

In addition to the testimony of the parties, plaintiff offered testimony of several witnesses supporting the charge that her husband had been seeing other women.

A clinical psychologist who counseled with plaintiff testified she was suffering from an acute anxiety reaction of a situational type and her emotional makeup had been deteriorating as a result of her relationship with her husband. In his opinion, reconciliation would be futile and would only intensify her emotional deterioration.

In applying the definitions of incompatibility as set forth in *Berry*, to the facts of this case, we are satisfied the trial court acted well within its discretion in granting the divorce for incompatibility. The evidence illustrates a pattern of marital difficulties dating from the beginning of the marriage. There is testimony from plaintiff, as well as a clinical psychologist, as to the futility of any attempt at reconciliation. The parties have testified to the changes in themselves since their marriage which appear to have led to divergent goals and interests. Defendant's conduct throughout the proceedings, as well as numerous statements made by him at trial, further indicate the irreconcilable differences that existed between the parties. Based on the evidence presented, we agree with the conclusion of the trial court that the parties were incompatible.

[5] The balance of defendant's arguments focus upon the constitutionality and validity of the incompatibility statute. The premise on which each of these challenges is made is that the trial court granted what is referred to as a "unilateral divorce." Unilateral divorce, as it relates to incompatibility, denotes a divorce granted when only one of the parties is incompatible. (See Schulman, Incompatibility: A "New" Approach to the Dissolution of Marriage, 20 Kan.L.Rev. 227.) This premise is contrary to the evidence and the specific findings of the trial court. The court stated that the parties did not have common interests or goals and they argued and quarreled. There was evidence from both parties as to their differing personalities and constant conflicts. Such evidence was not restricted solely to charges by plaintiff. Defendant himself testified as to their arguments and divergent interests. The only reasonable conclusion we can reach is that each party is incompatible with the other. This finding negates defendant's claim that there was a unilateral divorce. Defendant's contentions cannot be sustained since the premise on which they are based is untrue. We do not imply that if the premise were true we would find merit in defendant's position. We are merely saying the issues raised by defendant need not be resolved in this action.

All points raised by defendant have been considered and found to be without merit, and the judgment is affirmed.

FROMME, J., not participating.

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 47,701

Patricia Anne North, Appellee,

v.

Kenneth E. North, Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing by Appellant is considered and DENIED.

Motion by Appellant to Stay Proceeding is considered and DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date June 2, 1975

IN THE
SUPREME COURT OF THE STATE OF KANSAS

Supreme Court Case 47701

PATRICIA ANNE NORTH,
Appellee,

vs.

KENNETH E. NORTH,
Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Kenneth E. North, the above named Appellant, on the 5th day of June, 1975, hereby appeals to The Supreme Court of The United States from the final judgment of The Supreme Court of The State of Kansas, entered in this action on the 2nd day of June, 1975, affirming a judgment of Division I, Johnson County, Kansas District Court, granting a decree of divorce on the grounds of incompatibility to the above named appellee.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

II. The Clerk will please prepare and certify a transcript of the record in this cause for transmission to the Clerk of The Supreme Court of The United States, and include in the said transcript all records, briefs, motions, answers, and rulings.

III. The following questions are presented by this appeal:

A. Whether or not K.S.A. 1974 Supp. 60-1601(8), applied in a unilateral manner, did in fact consti-

tute a denial of the Appellant's right to equal protection under the law;

B. Whether or not K.S.A. 1974 Supp. 60-1601(8), as applied, infringed upon Appellant's freedom-of-expression, and further functioned as a prior restraint upon the exercise of this right;

C. Whether or not K.S.A. 1974 Supp. 60-1601(8), having been challenged as constitutionally-repugnant by impeding the exercise of a fundamental right, fails the test of stricter judicial scrutiny.

By /s/ Kenneth E. North
5537 Neosho Lane
Shawnee Mission, Kansas
66205
Appellant, Pro Se

PROOF OF SERVICE

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

KENNETH E. NORTH, of lawful age, being first duly sworn upon oath, deposes and states that a true and correct copy of the above and foregoing "Notice of Appeal to The Supreme Court of The United States" was forwarded postage prepaid through restricted United States Mail from a United States Post Office to John H. Johntz, Jr., Payne & Jones Chartered, Tower Building, Olathe, Kansas, attorney for appellee, this 5th day of June, 1975, in accordance with U.S. Supreme Court Rule 33, paragraph 1.

By /s/ Kenneth E. North

Subscribed and sworn to before me, a Notary Public, this 5th day of June, 1975, in Shawnee Mission, Kansas.

/s/ Verna D. Clark
(Seal) Notary Public

My Commission expires: July 29, 1978.

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-333

KENNETH E. NORTH,
Appellant,

vs.

PATRICIA ANNE SANTEE,
Formerly PATRICIA ANNE NORTH,
Appellee,

APPEAL FROM THE SUPREME COURT OF KANSAS
KANSAS SUPREME COURT CASE NO. 47701

KENNETH E. NORTH
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APPELLANT, PRO SE

JOHN H. JOHNTZ, JR.
PAYNE & JONES, CHARTERED
The Tower Building,
Olathe, Kansas 66061

ATTORNEYS FOR APPELLEE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-333

KENNETH E. NORTH,
Appellant,

vs.

PATRICIA ANNE SANTEE,
Formerly PATRICIA ANNE NORTH,
Appellee.

APPEAL FROM THE SUPREME COURT OF KANSAS
KANSAS SUPREME COURT CASE NO. 47701

MOTION TO DISMISS

This is a motion to dismiss the appeal from the State Court on two grounds: (1) that the alleged federal question sought to be reviewed was not expressly passed on by the Kansas Supreme Court and the judgment of that Court rests on an adequate non-federal basis, and (2) that the matter is moot.

1. The Alleged Federal Question Sought to be Reviewed By This Appeal Was Not Expressly Passed On by the Kansas Supreme Court and The Judgment of the Kansas Supreme Court Rests on an Adequate Non-Federal Basis.

To substantiate jurisdiction for an appeal under the provisions of 28 U.S.C. §1257(2), the appellant is required to show that the final judgment of the Supreme Court of Kansas drew into question the validity of the Kansas divorce grounds statute of incompatibility, on the ground of its being repugnant to the Constitution of the United States, and that the final judgment was in favor of the validity of that divorce ground statute. The case, North v. North, 213 Kan. 217, 535 P.2d 914 (1975), simply and unequivocally did not draw in question the validity of the Kansas divorce grounds statute as being repugnant to the Constitution of the United States, nor was there any decision made in favor of the validity of the statute. As the Kansas Supreme Court itself stated: "The issues raised by defendant (the alleged unconstitutionality of the divorce grounds statute of incompatibility) need not be resolved in this action." North v. North, supra, at 917.

The essential reasoning of appellant's argument in his appeal to the Kansas Supreme Court was that there was not substantial evidence to support the Trial Court's finding of in-

compatibility and that therefore the Trial Court had granted a divorce arbitrarily and capriciously, simply upon the demand of one party without evidence, and that this type of unilateral divorce was repugnant to certain federal constitutional principles. Appellant then went on to detail at great length all of the possible unconstitutional aspects of granting a unilateral divorce. The total flaw, however, in the reasoning of appellant was that there was indeed substantial evidence upon which to find incompatibility -- not unilateral incompatibility but a mutuality of incompatibility -- and therefore the Trial Court was not allowing a unilateral divorce and therefore all of the alleged unconstitutional aspects of a unilateral divorce were, however interesting in an academic sense, simply not applicable to this particular lawsuit.

The record on appeal showed one hundred and six separate elements of evidence of the incompatibility of the parties ranging from failure of the appellant to file income tax returns to sexual incompatibility throughout the entirety of the marriage. The evidence included written documents, appellant's own testimony, and the testimony of a qualified expert behavioral scientist. (Significantly enough, the appellant did not present any evidence at all in opposition to appellee's evidence that the parties were incompatible -- seven or eight witnesses and four or five documents -- except his own appearance on the stand.)

Needless to say, once the Kansas Supreme Court reviewed the overwhelming evidence of the incompatibility of the parties, it correctly concluded that there was no unilateral divorce granted by the Trial Court and, therefore, the allegations of the unconstitutionality of a divorce ground statute of incompatibility interpreted to allow unilateral divorce need not be considered by the Kansas Supreme Court. The Kansas divorce grounds statute of incompatibility was simply not brought into question with regard to the United States Constitution and there was no decision in favor of its constitutionality one way or the other. Once the Kansas Supreme Court found that there was substantial evidence to support a finding of mutuality of incompatibility of the parties, the Court did not need to go further with its decision and decide the academic issue of whether a unilateral divorce statute would be unconstitutional.

> "The balance of defendant's arguments focus upon the constitutionality and validity of the incompatibility statute. The premise on which each of these challenges is made is that the trial court granted what is referred to as a 'unilateral divorce.' Unilateral divorce, as it relates to incompatibility, denotes a divorce granted when only one of the parties is incompatible. (See Schulman, Incompatibility: A "New" Approach to the Dissolution of Marriage, 20 Kan. L.Rev. 227.) This premise is contrary to the evidence and the specific findings of the trial court. The court stated that the parties did not have common interests or goals and they argued and quarreled. There was evidence from both parties as to their differing

personalities and constant conflicts. Such evidence was not restricted solely to charges of plaintiff. Defendant himself testified as to their arguments and divergent interests. The only reasonable conclusion we can reach is that each party is incompatible with the other. This finding negates defendant's claim that there was a unilateral divorce. Defendant's contentions cannot be sustained since premise on which they are based is untrue. We do not imply that if the premise were true we would find merit in defendant's position. We are merely saying the issues raised by defendant need not be resolved in this action." North v. North, supra at 917.

2. The Matter is Moot.

The appellee changed jobs after her divorce and met a man for the first time working at her new employment whom she later married after the mandate had come down from the Kansas Supreme Court affirming the divorce granted by the Trial Court. As a practical matter, the issue of the viability of the parties" marriage is indeed moot.

WHEREFORE, appellee moves the Court to dismiss the appeal in that the federal question sought to be reviewed was not expressly passed on and the judgment rests on an adequate non-federal basis, and the matter is moot.

Respectfully submitted,

JOHN H. JOHNTZ, JR.
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913 782-2500

ATTORNEYS FOR APPELLEE

see

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